

With regard to Issue #2, the Appeals Board finds no jurisdictional basis to consider whether an Administrative Law Judge exceeded his jurisdiction in granting temporary total disability compensation and medical treatment. These are not specific jurisdictional issues listed under K.S.A. 1997 Supp. 44-534a and the Administrative Law Judge did not exceed

his jurisdiction under K.S.A. 1997 Supp. 44-551. Therefore, respondent's Issue #2 is dismissed.

The Appeals Board will next consider whether claimant proved accidental injury arising out of and in the course of his employment with respondent. The Administrative Law Judge acknowledged that claimant was an unreliable witness and based claimant's award upon the testimony of claimant's wife. The concern by the Administrative Law Judge regarding the reliability of claimant's testimony is justified.

Claimant alleges accidental injury on February 23, 1998. During the preliminary hearing, claimant was adamant that the injury actually occurred on February 16, 1998, which was claimant's first day of employment with respondent.

In addition, claimant testified that he did not experience any pain while working for respondent on the date of the alleged accident, but, instead, began suffering pain symptoms and swelling as he walked home with his then girlfriend and now current wife (hereinafter referred to as "wife"). The walk home occurred at approximately 6:00 p.m. on the date of the alleged accident. At some time between 7:30 and 8:30 p.m., claimant contacted his wife and advised her that his shoulder was hurting and he was going to go to the emergency room. Claimant and his wife arrived at the emergency room at approximately 8:20 p.m. on February 23, 1998. At that time, claimant advised several members of the emergency room staff that he had injured himself while playing basketball. While the emergency room records do indicate that claimant throws mattresses at work, the cause of injury specifically indicates that claimant hurt his shoulder playing basketball "on a lay up, no direct blow."

Claimant's justification for providing the falsified statement to the emergency room was that he was afraid of losing his job with respondent if he filed a workers compensation claim. This story loses credibility when it is noted that claimant and his wife contacted respondent the first thing the next morning and advised them of the workers compensation claim. In addition, claimant and his wife testified that his arm was swollen from the shoulder down to the hand and that the wife noticed the swelling on their walk home from work on the date of accident. However, St. Francis Hospital emergency room records indicate his shoulder was "nonswollen." Claimant acknowledged the statements to the emergency room personnel regarding his playing basketball were lies. Claimant's wife testified that she was present in the emergency room when claimant made these statements, but provided no contradictory information to the emergency room staff at the time these statements were made.

An additional contradiction is present with regard to the specific job claimant was allegedly performing at the time of the accident. When claimant contacted Mr. John Rhodes, the respondent's plant manager, on the morning after the accident, he advised Mr. Rhodes that he injured himself while pushing the sling. This involves putting laundry items into a machine. The claimant later testified that he injured himself pulling floor mats from a machine. Mr. Rhodes testified that the job of pushing the sling would not involve the handling of floor mats.

Additional contradictory information centers around claimant's prior work and injury history. Claimant was asked on cross-examination if he ever suffered injury to his right shoulder prior to February 23, 1998. Claimant adamantly denied any prior injury to the shoulder or any prior workers compensation claim associated with the shoulder. Respondent then submitted into evidence workers compensation information dealing with claimant's settlement with Red Carpet V.I.P. Carwash on August 31, 1995. That settlement, in Docket No. 195,965, occurred while claimant was in the Shawnee County Jail and dealt with a date of accident of October 14, 1994, involving claimant's right shoulder, cervical spine, left hip, and low back. The matter was settled for a lump sum payment of \$2,000. Claimant adamantly denied this settlement and denied receiving any money even though the records directly contradict claimant's denials.

Claimant was then questioned regarding an accidental injury occurring on August 21, 1992, to his left knee and ankle while working for AAA Lawn Service. Claimant again denied any involvement in this litigation. Medical records placed into evidence from Dr. Kurt R. Knappenberger dated September 2, 1992, dealt with Dr. Knappenberger's examination of claimant's left knee and ankle from this August 21, 1992, accident. Dr. Knappenberger's September 1992 report indicates that claimant was placed in an air cast for his knee and provided crutches. Dr. Knappenberger then observed claimant crossing the parking lot to his car after the examination. As claimant approached the car, he quit using the crutches, removed the air cast from his knee, climbed into his pickup, and left without any apparent problems. Claimant received no award as a result of this litigation.

Claimant was then questioned regarding an accidental injury occurring while employed with I-70 Auto Auction. Claimant denied any I-70 Auto Auction workers compensation claim. Documentation was then placed into evidence showing claimant's settlement of September 22, 1994, in his claim against I-70 Auto Auction for an injury occurring on September 13, 1993, to claimant's left knee and back. This matter was settled for \$1,000.

The Administrative Law Judge, in the Order, acknowledged that claimant was an unreliable witness and discounted all of his testimony as a result. The basis of the Award stems from the Administrative Law Judge's reliance upon the testimony of claimant's wife whom he identifies as Mrs. Hunsecker, but whom the record identifies as Mrs. Hockenbury, previously known as Mary Jane Lewis. Claimant and Ms. Lewis were married in March, 1998.

Mr. Rhodes, the respondent's plant manager, identified Mrs. Hockenbury as a "long, long time employee with American Linen and a very favorite employee." He went on to acknowledge that everyone liked Mrs. Hockenbury and that she was the reason why claimant was hired in the first place.

It is significant, however, that Mrs. Hockenbury's testimony is contradicted in more than one instance. First, Mrs. Hockenbury described swelling of claimant's entire arm from the shoulder down to the hand during their walk home at approximately 6:00 p.m. on

February 23, 1998. At 8:20 p.m. that same night, the St. Francis Hospital emergency room records indicate no swelling during their examination of claimant's shoulder. In addition, Mrs. Hockenbury acknowledged being present in the emergency room when claimant provided the now alleged lie regarding the injury he suffered while playing basketball. Mrs. Hockenbury made no comment at the time this allegedly falsified information was provided to the emergency room staff.

The Award by the Administrative Law Judge was based entirely upon the testimony of Mrs. Hockenbury, claimant's wife. However, the Appeals Board finds significant concern with the fact that Mrs. Hockenbury would allow claimant to provide what is now described as a lie to the emergency room staff with no apparent attempt to correct the medical records.

In workers compensation litigation, it is claimant's burden to prove his entitlement to an award by a preponderance of the credible evidence. The Appeals Board cannot find, in this instance, that the testimony of the claimant, or the testimony of claimant's wife, constitute credible evidence, as their testimony is contradicted on numerous occasions with medical records, other workers compensation documents, and their own contradicting statements. The Appeals Board, therefore, finds that the Order by the Administrative Law Judge should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated June 22, 1998, should be, and is hereby reversed as claimant has failed to prove accidental injury arising out of and in the course of his employment with the respondent on the date alleged.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: Thomas O. Rost, Topeka, KS
Eric T. Lanham, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director